

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.2.2019

CORAM

**THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN**

Tax Case Appeal No.169 of 2019

Smt.Ritha Sabapathy

Appellant

Vs.

Deputy Commissioner of Income Tax,
Circle - 1, Chennai.

Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench, Chennai, dated 18.8.2016 made in ITA No.1567/Mds/2016.

For Appellant : Mr.R.Sivaraman
Senior Standing Counsel
For respondent : Mrs.V.Pushpa

J U D G M E N T

(Delivered by DR.VINEET KOTHARI,J)

The Assessee has filed this Tax Case (Appeal) under Section 260-A of the Income Tax Act aggrieved by the order dated 18th August, 2016, passed by the learned Income Tax Appellate Tribunal for the Assessment Year 2010-2011, dismissing the appeal of the Assessee, not on merits, but, for want of prosecution. The following substantial question of law is framed for our consideration:-

"Whether, on the facts and in the circumstances of the

case, the Hon'ble Income Tax Appellate Tribunal was right in law in dismissing the appeal preferred by the Appellant in I.T.A.No.1567/Mds/2016 for the Assessment Year 2010-2011 on the ground of non-appearance without disposing the appeal on the merits of the case as prescribed under Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963?"

2. Having heard the learned counsel appearing for the parties, we are satisfied that the impugned order of the Tribunal deserves to be set aside and the matter deserves to be remanded to the Tribunal for hearing the matter on merits.

3. Section 254 of the Act empowers the Tribunal to pass such orders '**as it thinks fit**' after giving both the parties an opportunity of being heard. Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963 is quoted below for ready reference:-

"Hearing of appeal ex parte for default by the appellant.

Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the

Tribunal may dispose of the appeal on merits after hearing the respondent;

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal."

4. The Hon'ble Supreme Court has laid down in *Balaji Steel Re-Rolling Mills v. Commissioner of Central Excise and Customs* (Civil Appeal No.10265 of 2014, dated 14.11.2014) (2015 AIR SCW 426) that the fact finding Appellate Tribunals should decide the appeals only on merits and they have no power to dismiss the Appeals for want of prosecution. The relevant portion of the said decision is extracted hereunder:-

" 11) From a perusal of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or may remand the matter. **It does not give any power to the Tribunal to**

dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.

12) A similar question came up for consideration before this Court in **The Commissioner of Income-Tax, Madras vs. S. Chenniappa Mudaliar, Madurai 1969 (1) SCC 591** wherein this Court considered the provisions of **Section 33** of the Income-tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 which gave power to the Tribunal to dismiss the appeal for want of prosecution. For ready reference, **Section 33(4)** of the Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 are reproduced below:-

Section 33(4) of the Income Tax Act, 1922

"33(4). The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

Rule 24 of the Appellate Tribunal Rules, 1946

"24. Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may dismiss the appeal for default or may hear it ex parte."

Considering the aforesaid provisions, this Court held as under:-

*" 7. The scheme of the provisions of the Act relating to the Appellate Tribunal apparently is that it has to dispose of an appeal by making such orders as it thinks fit on the merits. It follows from the language of [Section 33\(4\)](#) and in particular **the use of the word "thereon"** that the Tribunal has to go into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. **This can only be done by giving a decision on the merits***

on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned has failed to appear. As observed in *Hukumchand Mills Ltd. v. CIT* (AIR 1967 SC 455), the word "thereon" in Section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal and the words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by Section 31 of the Act. The provisions contained in Section 66 about making a reference on questions of law to the High Court will be rendered nugatory if any such power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been properly filed, for default without making any order thereon in accordance with Section 33(4). The position becomes quite simple when it is remembered

that the assessee or the CIT, if aggrieved by the orders of the Appellate Tribunal, can have resort only to the provisions of [Section 66](#). So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under [Section 33\(4\)](#). It follows from all this that **the Appellate Tribunal is bound to give a proper decision on questions of fact as well as law which can only be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant.** It was laid down as far back as the year 1953 by S.R. Das, J. (as he then was) in [CIT, v. Mtt. Ar.S.Ar.Arunachalam](#)

*Chettiar (AIR 1953 SC 118) that the jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under [Section 33\(4\)](#) and a question of law arising out of such an order. The Special Bench, in the present case, while examining this aspect quite appositely referred to the observations of **Venkatarama Aiyar, J. in [CIT v. Scindia Steam Navigation Co. Ltd. \(AIR 1961 SC 1633\)](#)** indicating the **necessity of the disposal of the appeal on the merits by the Appellate Tribunal**. This is how the learned judge had put the matter in the form of interrogation:*

"How can it be said that the Tribunal

should seek for advice on a question which it was not called upon to

consider and in respect of which it

had no opportunity of deciding

whether the decision of the Court

should be sought."

Thus looking at the substantive provisions of the Act **there is no escape from the conclusion that under Section 33(4) the Appellate Tribunal has to dispose of the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance."**

13) Applying the principles laid down in the aforesaid case to the facts of the present case, as the two provisions are similar, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the **appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing.**

The High Court also erred in law in upholding the order of the Tribunal.

14) We, therefore, set aside the order dated 18.01.2014 passed by the High Court of Judicature of Bombay, Bench at Aurangabad and

also the order dated 22.08.2012 passed by the Tribunal and direct the Tribunal to decide the appeal on merits.

15) Accordingly, the appeal is allowed with a cost of Rs. 25,000/- to be payable by the Respondent."

5. The following observation of Special Bench of Madras High Court in *S.Chenniappa Mudaliar v. CIT* ((1964) 5 ITR 323) affirmed by Hon'ble Supreme Court in *CIT v. S.Chenniappa Mudaliar* ((1969) 1 SCC 591) = ((1969) 74 ITR 41) are also interesting and quoted below:-

"To sum up the position, the Appellate Tribunal is the appointed machinery under the Act for finally deciding questions of fact in relation to assessment of income-tax. Its composition, consisting as it does of **qualified persons in law and accountancy, makes it peculiarly qualified to deal with all questions raised in a case, whether there be assistance from the party or his counsel or not.** Section 33(4) obliges it to decide an appeal, after giving an opportunity to the parties to put forward their case. **The giving of the opportunity only**

emphasises the character of the quasi-judicial function performed by the Appellate Tribunal. The fact that that **opportunity is not availed of in a particular case, will not entitle the Tribunal not to decide the case.** There can be no decision of the case on its merits if the matter is to be disposed of for default of appearance of the parties. Further, an **adjudication on the merits of the case is essential to enable the High Court to perform its statutory duty and for the Supreme Court to hear an appeal filed under section 66-A.** Section 33 (4) itself indicates by the use of the word 'thereon' that the decision should relate to the subject matter of the appeal. Rule 24, therefore, to be consistent with Section 33(4), could only empower the Tribunal to dispose of the appeal on its merits, whether there be an appearance of the party before it or not. This was indeed the rule when it was first promulgated in the year 1941. **The rule in its present form, as amended in the year 1948, in so far as it enables the dismissal of an appeal before the Income tax Appellate Tribunal for default**

*of appearance of the appellant, **will, therefore, be ultra vires**, as being in conflict with the provisions of Section 33(4) of the Act."*

6. The aforesaid enunciation of law will govern even now under the new Income Tax Act, 1961 since the words in Section 254 of the Act continues to be the same viz., "the Tribunal may pass such orders 'thereon' as it thinks fit". Of course, Rule 24 has since been amended by the Income Tax (Appellate Tribunal) Rules, 1963, with effect from 1.8.1987 to fall in line with the aforesaid dicta of the Hon'ble Supreme Court in the case of *CIT v. Chenniappa Mudaliar* (supra) and now, the said Rule 24 does not permit the Tribunal to dismiss the case for default of appearance at all.

7. We are rather little surprised that how, after so much of case laws on the issue and amendment of Rule 24 itself, the learned Members of the Tribunal, even now commit the said folly of dismissing the appeals for want of prosecution and for default of appearance on the part of the Appellants/Assessees. As far as the Department is concerned, they have their own Standing Counsels to appear in the Tribunal, but, the Assessees' Counsels may, some time, not put in appearance for a variety of reasons or for genuine overriding reasons for such non-appearance of the Counsels on their parts may be because of non-availability of the Counsels on particular day, costs

involved in engaging counsels, etc. or any other such factors but, that does not entitle the Tribunal to dismiss the appeal without deciding the merits of the case.

8. On a conjoint reading of the relevant provisions of the Act, Rule 24 of the Income Tax (Appellate Tribunal) Rules and the aforesaid decisions of the Hon'ble Supreme Court, we are of the considered opinion that the Tribunal could not have dismissed the appeal for want of prosecution. Even if the assessee could not appear, the Tribunal could have decided the appeal only on merits, ex parte, after hearing the Revenue Side but, the dismissal of the appeal for want of prosecution is not only illegal but also entails further litigation and proceedings by compelling the Assessee to move for setting aside the ex parte order, which Tribunal is supposed to do but in the present case even that application too came to be dismissed by the learned Tribunal.

9. The Proviso to Rule 24 clearly mandates that the Tribunal shall set aside such ex parte order and restore the appeal for deciding the same on merits. However, the Tribunal seems to have been contended by dismissing the appeal for want of prosecution only and not touching the merits of the case at all and then further erred in dismissing the Miscellaneous Petition filed for recalling the ex parte order dismissing the appeal for want of prosecution.

10. We are not going into the merits of the case deliberately, though we are informed that the issue on hand was covered by the decision of the jurisdictional High Court which was binding on the Tribunal. We leave it free to the Tribunal to decide the appeal on merits and in accordance with law.

11. We reiterate that the fact finding Tribunals should not shirk their responsibility to decide the cases on merits because the view and reasons given by such Tribunals are important for the Constitutional Higher Courts to look into while deciding the substantial questions of law under Section 260-A of the Act arising from Tribunal's orders. Obviously, such cryptic orders, not touching the merits of the case, would not give any rise to any substantial question of law for consideration by the High Courts under Section 260-A of the Act. The Assessee's valuable rights of getting the issues decided on merits by the final fact finding body viz., the Tribunal cannot be given a short shrift in the aforesaid manner. A legal and binding responsibility, therefore, lies upon the Tribunal to decide the appeal on merits irrespective of the appearance of the Assessee or his counsel before it or not.

12. Considering the enabling powers in the words '**as it thinks fit**' employed in Section 254 of the Act read with Rule 24 and in view of the law laid down by the Hon'ble Supreme Court aforesaid, we set

aside the impugned order of the learned Tribunal and direct the Tribunal to decide the appeal on merits afresh in accordance with law.

13. The parties may appear before the Tribunal at the first instance on **11.3.2019** and the Tribunal may decide the appeal afresh on merits in accordance with law within a period of three months thereafter.

14. With this observation, the present appeal is allowed and the substantial question of law is answered in favour of the Assessee and against the Revenue. No order as to costs.

15. Copy of this judgment may be sent to the President of the Income Tax Appellate Tribunal as well as the Law Secretary in the Ministry of Law and Justice so that the same may be brought to the notice of all the Members of Income Tax Appellate Tribunal and the new appointees in Income Tax Appellate Tribunal at the time of their recruitment itself. The President of Income Tax Appellate Tribunal may also get it circulated to all the existing Members of the Income Tax Appellate Tribunal, so that such orders resulting in serious miscarriage of justice should not be repeated by any Member of the Tribunal.

(V.K.,J.) (C.V.K.,J.)
19.2.2019

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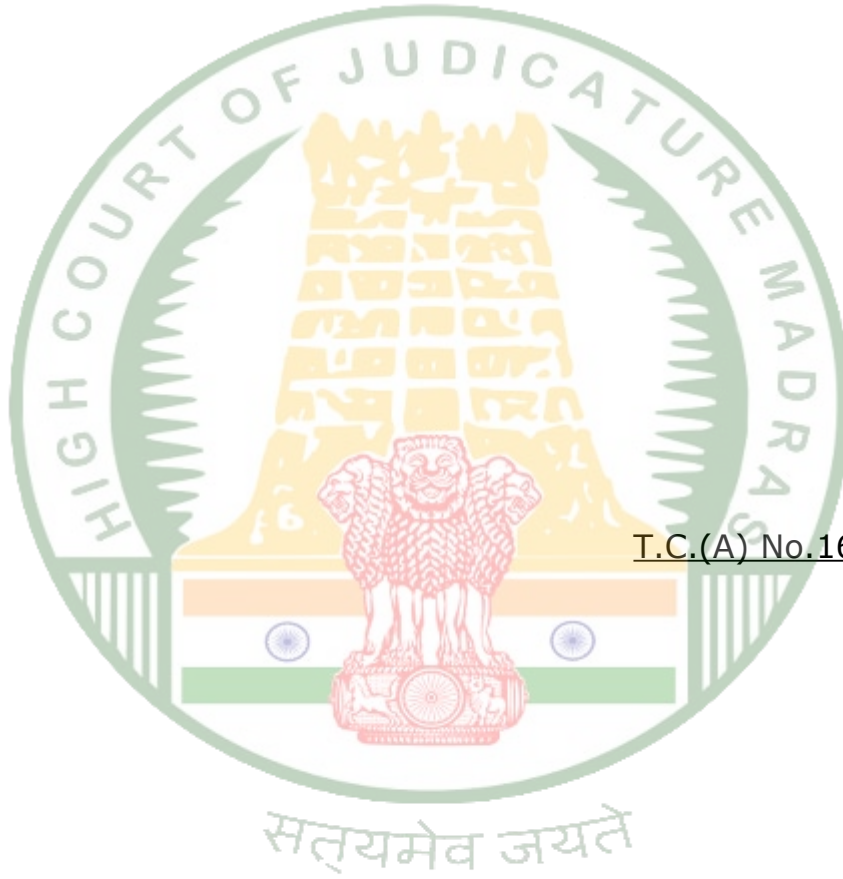
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DR.VINEET KOTHARI, J.
and
C.V.KARTHIKEYAN, J.

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